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No. 97-81

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

THE DELAWARE RIVER AND BAY AUTHORITY,
Petitioner,
v.
INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 68, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF OF *AMICI CURIAE*, GRAND LODGE OF THE FRATERNAL ORDER OF POLICE, AND FRATERNAL ORDER OF POLICE PENN-JERSEY LODGE 30 IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

THOMAS T. RUTHERFORD
General Counsel to the Grand Lodge of the Fraternal Order of Police
320 Gold Street S.W.
Suite 1000
Albuquerque, NM 87103
(505) 842-6700
Counsel for Amici Curiae, *Grand Lodge of the Fraternal Order of Police*

BRUCE E. ENDY *
CHARES T. JOYCE
SPEAR, WILDERMAN, BORISH, ENDY, SPEAR AND RUNCKEL, P.C.
230 South Broad Street
Suite 1400
Philadelphia, PA 19102
(215) 732-0101
Counsel for Amici Curiae, *Fraternal Order of Police, Penn-Jersey Lodge 30*

* Counsel of Record

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether complementary and substantially similar legislation enacted by states which are parties to an interstate compact may be applied to a bi-state agency that is a creature of that compact, when the express terms of the compact, as approved by Congress, provide that additional duties or obligations may be undertaken by the agency if authorized by the laws of both states. The New Jersey Supreme Court, applying a long-settled and well established principle of legal construction of congressionally-approved interstate compacts, which does not conflict with the decisions of this Court, other state high courts, or the federal courts, answered that question in the affirmative, and ruled that the parallel labor law policies of New Jersey and Delaware that allow all public employees to organize and negotiate collectively with their employers should be applied to the Delaware River and Bay Authority, a bi-state agency of New Jersey and Delaware.

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THE INTEREST OF THE *AMICI CURIAE* GRAND LODGE OF THE FRATERNAL ORDER OF POLICE AND FRATERNAL ORDER OF POLICE PENN-JERSEY LODGE 30 *

The Grand Lodge of the Fraternal Order of Police ("Grand Lodge") is an international organization of full-time law enforcement officers employed by federal, state or local government agencies. Its 1,982 local lodges comprise a total membership of 265,441 active members. The Fraternal Order of Police was founded in 1915 in Pitts-

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* The cost of this *amici curiae* brief was paid in full by the Grand Lodge of the Fraternal Order of Police and Fraternal Order of Police Lodge 30. Neither the Respondent nor the Petitioner contributed to its preparation.

burgh, Pennsylvania, and is currently incorporated under the laws of the Commonwealth of Pennsylvania. The Grand Lodge serves 39 affiliated state lodges in the United States, and has two international affiliates in Canada and Ireland. The Grand Lodge has its headquarters in Nashville, Tennessee, and also maintains offices in Washington, D.C.

The affiliates of the Grand Lodge represent law enforcement officers employed by several congressionally-approved interstate agencies, including the Delaware River and Bay Authority, the petitioner herein, and the Delaware River Port Authority, a bi-state agency of New Jersey and Pennsylvania. Thus, the Grand Lodge maintains an abiding interest in insuring that interstate agencies comply fully with their legal obligations, as set forth by their respective creator states, to recognize the rights of their employees to organize and negotiate collectively the terms and conditions of their employment.

The Fraternal Order of Police Penn-Jersey Lodge 30, ("Lodge 30" or "FOP"), is a labor organization and the exclusive negotiation representative for police officers employed by the DRPA. Lodge 30 is affiliated with the Grand Lodge through the Pennsylvania Lodge.

Since the Mid-1970s, the DRPA and Lodge 30 have entered into a series of successive collective bargaining agreements to determine the wages and working conditions of DRPA patrol officers. See attached Appendix to Brief of *Amici Curiae* FOP, 3a-4a. ("FOP App."). In August, 1996, however, the DRPA unilaterally imposed a new set of employment terms and conditions upon its FOP-represented patrol officers, and Lodge 30 brought an action in New Jersey Superior Court seeking an order compelling the DRPA to rescind these terms and conditions, and to negotiate in good faith with the FOP. FOP App. 1a. Lodge 30's lawsuit was predicated, in part, upon the Decision of the Appellate Division of the New Jersey Superior Court in *IUOE Local 68, et al. v. Delaware River and Bay Authority* (reprinted in Peti-

tioner's Appendix at App. 22a), then on appeal to the New Jersey Supreme Court.

On December 20, 1996, the New Jersey Superior Court issued a bench ruling in Lodge 30's Action against the DRPA, holding that New Jersey and Pennsylvania had "set forth parallel or complementary legislation" which "clearly gives public employees a right to freely organize and designate representatives and also to negotiate in good faith," FOP App. 17a, and that this policy governed Lodge 30's labor relations with the DRPA. *Id.* 16a.

As the continuing viability of Lodge 30's litigation depends in substantial degree upon the holding and rationale of the New Jersey Supreme Court decision in this case, Lodge 30's interest in this Petition is direct and immediate.

The Grand Lodge of the Farternal Order of Police and Fraternal Order of Police Penn-Jersey Lodge 30 have received written consent of the parties to file an *Amici Curiae* brief in opposition to the Petition for Writ of Certiorari. The letters signifying this consent are filed with the Clerk of this Court along with this brief.

SUMMARY OF ARGUMENT

The Petition for Certiorari should be denied, as the decision by the New Jersey Supreme Court below merely represents a creator state court's construction of the terms of an interstate compact, a construction identical to that employed by the courts of the other party to the compact, the State of Delaware, and one that is entirely consistent with this Court's Compact Clause precedents, and not in material conflict with any other state or federal decision. Fundamentally, this case concerns the meaning each of the creator states have given to the terms of their bi-state compact. Since they fully agree on the legal approach used to divine such meaning, there is no need for this Court to intervene.

Further, petitioner's claim that the decision below will lead to "discord and a destruction of the purposes for

which bi-state agencies are formed" is wholly without support in the record and thus invites this Court to engage in an abstract and highly speculative analysis of the potential reach and impact of this decision. Such a case, in such a posture, should not be reviewed by this Court.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW APPLIES LONG-SETTLED AND CONSISTENT PRINCIPLES OF NEW JERSEY AND DELAWARE JURISPRUDENCE REGARDING THE APPLICABILITY OF COMPLEMENTARY AND PARALLEL LAWS OF THE CREATOR STATES TO THE DELAWARE RIVER AND BAY AUTHORITY, AND THERE IS NO REASON FOR THIS COURT TO DISTURB THIS WELL-ESTABLISHED DOCTRINE

In its Petition, the Delaware River and Bay Authority ("Bay Authority" or "Petitioner") launches a blunderbuss-style assault upon the principle that an agency formed by an interstate compact can be regulated by parallel and complementary legislation passed by the states that have formed the compact. However, no reason exists for this Court to "commit[] its scarce judicial resources" to adjudge the merit of the principle of complementary legislation in this case. *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). Both of the states that created the interstate compact involved in this case—New Jersey and Delaware—have consistently embraced the doctrine, and have considered it a settled staple of their jurisprudence for over three decades.

Indeed, it is singularly ironic that this petitioner now protests the principle of parallelism, as it was first espoused over 30 years ago by the Delaware River and Bay Authority itself, in a case that, perhaps fittingly, arose out of a labor dispute. In *Delaware River and Bay Authority v. International Association of Masters, Mates, and Pilots*, 211 A.2d 789 (N.J. 1965), the New Jersey Supreme Court ruled that the DRBA's employees were prohibited from engaging in a work stoppage because

they were "public employees" who, under New Jersey and Delaware law, were forbidden from striking. Upholding the Bay Authority's right to petition the Chancery Court for an injunction to end the labor dispute, the New Jersey Supreme Court held, "[t]he fact that the Authority is designated as a bi-state agency, rather than an agency of New Jersey alone, has no materiality," because there is "no indication that the historic and widely prevailing policy against strikes by public employees is not equally applicable in both states." 211 A.2d at 794.[1] The court thus found that an aspect of labor regulation was applicable to the petitioner because its creator states shared a "prevailing" public policy on the subject, and conferred a right upon the petitioner—the authorization to seek injunctive relief to combat a strike by its employees—that was not specifically granted in the bi-state compact that created the Bay Authority.

One year after *Masters, Mates and Pilots*, the Delaware courts signalled their ready acceptance of the concept of parallel and complementary legislation in yet another case involving the petitioner, *Delaware River and Bay Authority v. Carello*, 222 A.2d 794 (Del. Ch. 1966). Petitioner

[1] As the court in *Masters, Mates and Pilots* noted, strikes by public workers were prohibited in New Jersey by virtue of the Attorney General's memorandum opinion construing the rights of public employees under the New Jersey Constitution, Article I, Paragraph 19, and the New Jersey Superior Court's decision in *New Jersey Turnpike Auth. v. AFSCME, Local 1511*, 200 A.2d 134 (N.J. Super. Ct. Ch. Div. 1964), which held that public employees have the right to organize and engage in collective negotiations with their employers (who have the concomitant duty to consider their proposal in "good faith"), but do not possess the power to strike over their demands or proposals. See *Masters, Mates*, 211 A.2d at 791-93. At the time, Delaware possessed a similar prohibition against public sector work stoppages, featured as part of a legislative enactment. *See* Right of Public Employees to Organize Act, *Del. Code Ann.* title 19 §§ 1301-1312, *repealed*, Public Employment Relations Act, *Del. Code Ann.* title 12 §§ 1301-1318 (Supp. 1994). New Jersey eventually codified its restriction upon public employee strikes when it enacted the Public Employer-Employee Relations Act in 1968. N.J.S.A. § 34:13A-1 *et seq.*

wrongly asserts that *Carello* stands for the proposition that only "concurrent legislation passed by the compact states" that "plainly state[s] that it applies to the interstate authority or is in fact intended to amend the compact", may serve to regulate a bi-state agency. (Pet. 18) Exactly the opposite is true, as a plain reading of the case indicates. In *Carello,* the Delaware Chancery Court ruled that Delaware's public sector labor statute was inapplicable to employees of the Bay Authority, *not* because it did not expressly cover these employees, but only because New Jersey had not, as of then, passed similar labor legislation. As the court put it, "the Delaware statute in issue must remain ineffective *until concurrent legislative action of a similar nature is taken by the State of New Jersey.*" 222 A.2d at 799 (emphasis added).

Following *Carello,* the theory of complementary legislation was next discussed by a New Jersey court in *Eastern Paralyzed Veterans Ass'n v. Camden,* 545 A.2d 127 (N.J. 1988) ("*Eastern*"). *Eastern* concerned the applicability of New Jersey anti-discrimination legislation to the Delaware River Port Authority ("DRPA"), a bi-state agency of New Jersey and Pennsylvania. In remanding the case to the trial court for it to determine whether "Pennsylvania's statues governing handicap accessibility" were substantially similar to New Jersey's so as to govern the DRPA, the New Jersey Supreme Court fully endorsed the concept of complementary legislation, holding:

> The corollary of the proposition that neither state may individually impose its will on the bi-state agency is that the agency may be made subject to complementary or parallel state legislation.

545 A.2d at 133, *citing Delaware River Joint Toll Bridge Comm. v. Colburn,* 310 U.S. 419 (1940).[2]

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[2] Significantly, the court in *Eastern* did not hold that the compact states' legislation had to explicitly specify that it embraced a particular bi-state agency. 542 A.3d at 134 (all that is "required to sustain this theory" is "[s]ome showing of agreement by both states" that their policies are meant to be applicable to the bi-state agency). However, finding that the issue of whether New Jersey's

Eastern, and two subsequent decisions of the New Jersey High Court, *Ampro Fisheries, Inc. v. Yaskin*, 606 A.2d 1099 (N.J. 1992), *cert. denied*, 506 U.S. 954 (1992), and *Bunk v. Port Authority of New York and New Jersey*, 676 A.2d 118 (N.J. 1996), further laid the doctrinal groundwork for the holding of the New Jersey Supreme Court below. In *Ampro Fisheries*, the court ruled that regulations promulgated by the New Jersey Department of Environmental Protection and Energy to restrict a certain class of commercial fishing were applicable to the Delaware Bay, even though that body of water was governed by a 1905 Interstate Compact between New Jersey and Delaware. The court found that because the New Jersey rules did "not directly conflict with any regulations enacted by the State of Delaware," they were "complementary and parallel," and "courts have regularly held that a bi-state agency may be subject to complementary or parallel state legislation that does not intrude on the mission of the agency." 606 A.2d at 1104, 1103.

In *Bunk*, the court considered whether an employee of the Port Authority of New York and New Jersey, a bi-state agency of those two states, was covered under a provision of New Jersey Workers' Compensation law that limited benefits of public employees receiving a disability pension for the same injury. This question required the court to apply the "principles of parallelism," and survey New York's provisions for simultaneous receipt of worker's compensation and disability benefits. 676 A.2d at 121. Noting that "[o]ne of the central themes of [both compact states'] recent legislatures is that there should not be double recovery from two sources for the same injury," the court held that New Jersey's limitation on benefits was fully consonant with the "dominant policy" of both New

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handicapped-access construction regulatory system was "complementary" to Pennsylvania's scheme was a "fact-sensitive" question of law, the court remanded the matter to the trial judge to "consider whether there is complementary legislation in New Jersey and Pennsylvania that would make equivalent the DRPA's obligation to each state to provide barrier-free access to handicapped persons." *Id.* at 134, 136.

Jersey and New York law, and therefore applicable to the Port Authority. *Id.* at 124.

Although over three decades separate the New Jersey Supreme Court's first articulation of the concept of parallelism in *Masters, Mates and Pilots* from that court's full fledged apotheosis of the principle in *Bunk,* the weave of reasoning linking these decisions is consistent and entirely straightforward. Just as no single creator state can unilaterally impose additional duties or obligations upon a bi-state agency, "the corollary of [that] proposition is that the agency may be subject to complementary or parallel state regulation." *Bunk,* 676 A.2d at 118; *Eastern,* 545 A.2d at 133. Legislative enactments need not be "identical" in each creator state to be given parallel effect; all that is necessary is that the laws be "substantially similar," *Carello*; *Eastern,* and articulate a "central" or "dominant theme" in the respective public policies of the states. *Eastern; Bunk.* Finally, the laws need not specifically provide that they are meant to cover a bi-state agency. *Masters, Mates and Pilots*; *Eastern.*

Thus, well before the New Jersey Supreme Court applied the principles of parallelism in the case below, courts in the two compact states had fully and routinely employed this doctrine. *See e.g., Carello; Textar Painting Corp. v. Delaware River Port Authority,* 636 A.2d 795, 798-99 (N.J. Super. Ct. Law Div. 1996) (DRPA must engage in competitive bidding of public contracts, even though its compact does not expressly require it, because the policy of both of its creator states is substantially similar and complementary).

Therefore, when properly viewed in context of the historical development of the doctrine of complementary legislation in New Jersey and Delaware, it strains credulity to seriously entertain petitioner's depiction of the decision below as constituting "an about-face" or a departure from consistent legal principles long-settled in the Compact states.[8] Before granting certiorari to pass upon

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[8] Petitioner's insistence that the decision below is an anomaly in the compact states' cases stems entirely from its reading of a single

a legal doctrine that is so firmly established, *Amici* thus respectfully submit that this Court should consider closely whether the petitioner's bold claims that the decision below contravenes the Compact Clause, or directly or materially conflicts with decisions of other state or federal courts, retain any real substance. As we go on to show, they do not.

II. THE DOCTRINE OF PARALLEL LEGISLATION AS APPLIED BY THE DECISION BELOW TO THE BAY AUTHORITY COMPACT DOES NOT CONTRAVENE THE COMPACT, VIOLATE THE COMPACT CLAUSE, OR CONFLICT WITH DECISIONS OF OTHER STATE OR LOWER FEDERAL COURTS

A. The Decision Is Not Contrary to the Terms of the Compact or to This Court's Precedents

Petitioner asserts that the decision below permits "the courts of one state unilaterally to subject an interstate compact authority to additional obligations or duties in direct contravention of the compact without the express consent of the compact states or congress," and thus must be reviewed by the Court. (Pet. 13). Such hyperbole betrays a profound misreading of the case, ignores the plain provisions of the Bay Authority Compact, and overlooks this Court's precedents regarding the mechanics of con-

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New Jersey Appellate Court decision, *Delaware River and Bay Authority v. New Jersey Pub. Employment Relations Comm'n* ("*New Jersey PERC*"), 270 A.2d 704 (N.J. Super. Ct. App. Div. 1970), *aff'd* 277 A.2d 880 (N.J. 1971). (*See* Pet. 19.). In *New Jersey PERC*, however, the court emphatically did *not* rule that the creator states' labor laws were inapplicable to a bi-state agency; rather, as the court put it, "[t]he narrow issue for determination" was whether PERC, the New Jersey administrative agency charged with overseeking New Jersey's public employment statute, could unilaterally maintain jurisdiction over the Bay Authority. 270 A.2d at 705. Because the agency had no jurisdiction over any "employer" but the State of New Jersey, its agencies or political subdivisions, the court simply and solely concluded that PERC lacked authority over a *bi-state* agency of Delaware and New Jersey —not that complementary policies embodied in both states' laws could not be applied by the states' courts to such an entity.

gressional consent to interstate compacts under the Constitution.

Fundamentally, the New Jersey Supreme Court did not rule that *courts* can unilaterally alter or modify a bi-state compact. Rather, the court below "merely recognized that the New Jersey and Delaware *legislatures* have adopted a substantially similar policy concerning collective negotiations by public employees. . . . As a matter of public policy, the legislatures of both states have concluded that public employees should have the right of collective negotiation and that employers should not interfere with that right." App. 12a-13a (emphasis added). Finding that it would be "[a]nomalous indeed" to fail "to apply so important a policy to an entity created by both states for their mutual benefit," the court concluded that by enacting substantially similar public sector labor legislation, "*the legislatures have modified the Compact.*" *Id.* (emphasis added). Thus, the decision below was premised not upon a unilateral exercise of judicial power, but upon the mutually expressed will of the legislatures of both Compact states.

Contrary to petitioner's arguments, ample authority for this bilateral legislative action—the *sine qua non* for the principle of parallelism—was found by the New Jersey Supreme Court in the very language of the Bay Authority Compact. As the court noted, Article VIII of the Compact specifies that the Bay Authority shall not undertake any additional duties or obligations "under the law of either State or Congress without authorization by the law of both states." App. 12a; 61a; 80-81a. "Implicit in that provision," reasoned the court, "is the premise that the two states may subject the DRBA to complementary or parallel legislation." App. 12a.

The presence of Article VIII also dispatches petitioner's alternative argument, that the decision below "circumscribes Congress' constitutionally mandated consent role" embodied in the Compact Clause of the Constitution. Pet. 14). Indeed, while the "requirement of congressional consent is at the heart of the Compact Clause," *Cuyler v.*

Adams, 449 U.S. 433, 439 (1981), this Court has also made plain that "Congress may consent to an interstate compact *by authorizing joint action in advance* or by giving express or *implied* approval to an agreement the states have already joined." *Id.* at 444 (emphasis added). Following *Cuyler*, federal courts have found implied or advance congressional approval of subsequent modifications made by compact states to an interstate compact by relying upon language similar to that contained in Article VIII of the DRBA Compact. In *Waterfront Comm'n v. Construction and Marine Equipment Co.*, 928 F.Supp. 1388 (D.N.J. 1996), for example, the court held that Congress' original 1953 consent to the Interstate Compact that formed the Waterfront Commission of New York Harbor, containing a provision that "amendments and supplements" to the Compact could be effectuated "by the action of the legislature of either state concurred in by the legislature of the other," allowed the creator states to enact legislation modifying the Compact in 1966, without further express congressional approval. 928 F.Supp. at 1403.

In like fashion here, when Congress gave its consent to the Bay Authority Compact in 1962, it approved Article VIII, allowing the Compact states to impose additional obligations or duties upon the petitioner by the means of parallel and complementary legislation. Under *Cuyler*, no subsequent congressional blessing of the decision of the New Jersey and Delaware legislatures to modify the Compact by enacting substantially similar public sector labor laws is constitutionally mandated, and the absence of any "express" consent by Congress thus forms no basis for this Court's review of this case.[4]

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[4] While the 1962 Joint Congressional Resolution bestowing approval upon the Bay Authority Compact advised that it was not granting advance consent for the assumption by the Authority of additional *powers* under Article VII, it did not withhold congressional assent for the imposition by the creator states of additional *obligations* or *duties* upon the petitioner. App. 68a. Such an ap-

B. The Decision Below Does Not Materially Conflict With Decisions of Other State Courts or Federal Courts

In groping for a reason for this Court to exercise certiorari jurisdiction here, petitioner suggests that the application of the principle of complementary legislation by the New Jersey Supreme Court below conflicts with holdings of Delaware, Pennsylvania, Washington and New York state courts, as well as decisions of the federal Courts of Appeal and District Courts. Pet. 18-20. This assertion is simply inaccurate. In making it, petitioner misreads the cases it cites, conjuring up conflicts that either do not exist, or are of no or material import to this Petition.

First, and most significantly, the courts of Delaware—the only other Compact state involved here—fully join in New Jersey courts' long adherence to the principle of complementary legislation. In *Carello,* the Delaware Chancery Court observed that the only impediment to the application of Delaware's policy protecting public employee labor rights to the Bay Authority was the absence of "legislative action of a similar nature . . . taken by the State of New Jersey." 222 A.2d at

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proach to continuing congressional oversight accords fully with the teachings of this Court. As Justice O'Connor has explained,

> The Consent Clause neither transforms the nature of state power nor makes Congress a full fledged participant in the underlying agreement; it requires *only* that Congress 'check any infringement of the rights of national government' . . . In consenting, Congress certifies that the States are acting within their boundaries in our federal scheme and that the national interest is not offended.

Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 394, 408 (1994) (O'Connor, J., Dissenting), *quoting* J. Story, Commentaries on the Constitution of the United States § 1403 p. 264 (T. Cooley ed. 1873). Plainly, an amendment by the Compact states that merely protects petitioner's employees' ability to organize and negotiate with the Bay Authority, and accords them the same labor rights enjoyed by every other public employee in these two states, can hardly be feared to "offend the national interest."

799. Similarly, despite petitioner's completely erroneous claims to the contrary, Pennsylvania courts have entirely adopted the principle of parallelism. In *Nardi v. Delaware River Port Authority*, 490 A.2d 949 (Pa. Cmwth. 1985), the Pennsylvania Commonwealth Court held that the disability provisions of the Pennsylvania Benefits Law, 53 Pa. Stat. Ann. §§ 637, *et seq.*, did not cover DRPA police officers, but only because New Jersey's equivalent compensation statute was "*not* substantially similar." 490 A.2d at 952 (emphasis in original). Indeed, the court in *Nardi* took pains to emphasize that "*identical* legislation" would not have been required to render the law applicable to the bi-state agency, and invited the New Jersey legislature to "amend its statute to reflect agreement with the clearly stated intention of the Pennsylvania legislature." *Id.* at n.10, n.11 (emphasis in original).[5]

Petitioner's contention that Washington state courts and the Ninth Circuit Court of Appeals reject the doctrine of parallel legislation likewise finds no support whatever in the cases cited. In *Salmon for All v. Department of Fisheries*, 821 P.2d 1211 (Wash. 1992) (en banc), for example, there was no attempt to apply bilateral state laws to an interstate agency; the plaintiff there merely argued that the Washington open meetings law unilaterally bound the proceedings of a Washington-Oregon bi-state agency, without referencing Oregon law. The theory of complementary legislation was not even mentioned, much less advanced as a basis for the plaintiff's claim. *See also Klickitat County v. State*, 862 P.2d 629 (Wash. Ct. App. 1993) (issue only whether Washington law indemnifying counties for adopting land use ordinance applied to Washington-Oregon interstate agency; no discussion of whether

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[5] Following *Nardi*, the Pennsylvania courts have expressly declared that "bi-state agencies . . . do not exist in a vacuum and are not immune from regulation. Such regulation can take several forms. . . . the member states can pass *substantially similar legislation*, as contemplated by the compact." *Delaware River Port Authority v. Ethics Comm'n.*, 585 A.2d 587, 588 (Pa. Cmwlth 1991) (emphasis added).

Oregon had similar law). Similarly, in *Seattle Master Builders Ass'n v. Pacific Northwest Electrical Power and Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987), the plaintiff unsuccessfully argued that the environmental laws of Montana and Washington were applicable to a *multi*-state compact, composed of those two sovereigns *as well as* Oregon and Idaho. 786 F.2d at 1362, 1370-71. Again, there was no effort to argue that the latter two states likewise featured such legislation, and the doctrine of parallelism was never raised.

The decision below plainly does not conflict, in any conceivable manner, with *any* of these cases.[6] Indeed, for all petitioner's efforts to portray the principle of complementary legislation as some sort of renegade legal doctrine, the only cases that display any degree of displeasure with this theory are one decision from the New York Court of Appeals, *Malverty v. Waterfront Comm'n of New York Harbor*, 524 N.E.2d 421 (N.Y. 1988) and a single, twenty-year old federal district court opinion, *C.T. Helmuth and Assoc. v. Washington Metro Area Transit Authority*, 414 F.Supp. 408 (D.Md. 1976). Both cases contain distinguishing elements that make their "conflict" with the New Jersey Supreme Court far less than first appears, and neither, in the context of our federal system, warrants this Court's exercise of its certiorari jurisdiction.

In *Malverty*, it is first noteworthy that the New York court's ostensible rejection of the doctrine of complementary legislation appears as *dicta*; the appellant there had contended that New York law applied *unilaterally* to the Waterfront Commission, a bi-state agency of New York

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[6] The only decision from a foreign jurisdiction that petitioner discusses accurately is *Redbird Engineering Sales, Inc. v. Bi-state Development Agency of Missouri-Illinois Metropolitan District, et al.*, 806 S.W. 2d 695 (Mo. App. Ct. 1991), which, citing the New Jersey Supreme Court's *Eastern* decision, fully adopted and applied the doctrine of complementary and parallel state legislation to a Missouri-Illinois bi-state compact. 806 S.W. 2d at 701-702. Pet. 20.

and New Jersey.[7] More importantly, the *Malverty* decision was premised upon a unique practice of the New York legislature. As the court noted, that deliberative body, unlike New Jersey or Delaware's, had a history of "expressly stat[ing] that certain legislation" it was enacting was meant specifically to govern the Waterfront Commission, and in the absence of such definitive legislative expression, no law was deemed applicable to that agency. *Malverty* is simply an expression of a discrete legislative determination regarding how obligations are to be imposed on entities established by compacts between New York and other states; it does not conflict with New Jersey and Delaware's shared view that *their* bi-state compacts may be subject to parallel legislation, even if such laws do not necessarily state that they are to apply to such entities.[8]

Grounded in the New York legislature's unique approach to amending or modifying the duties of a bi-state agency, *Malverty* hardly heralds a reason for this Court to grant this writ; indeed, the case actually points to the wisdom of this Court's staying its hand. Petitioner assumes a need to craft a uniform federal approach to interpreting the terms and conditions of each discrete interstate compact. Putting aside the now demonstrated fact that the vast weight of judicial authority supports the means of construction employed by the New Jersey Supreme

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[7] Indeed, it is worth observing that *Malverty* did not purport to overrule an earlier New York High Court case, *Agesen v. Catherwood*, 260 N.E.2d 525, 528 (N.Y. 1970) which held that "the two [compact] states, by bilateral action, may always regulate [a compact] authority action."

[8] Similarly, *C.T. Helmuth* dealt with certain discrete features of Virginia, Maryland, and District of Columbia laws regarding access to public records. Each jurisdiction, the court noted, featured key differences in their respective "freedom of information acts," leading the court to conclude "[w]hatever force [the doctrine of parallel legislation] may have in the situation in which the various laws involved are identical, it is plainly unmeritorious here, where the laws involved *differ in not insignificant respects*." 414 F. Supp. 408, 410, and n.5 (emphasis added).

Court below, the problem with petitioner's argument is that it ignores the essential fact that interstate compacts are created primarily to effectuate and foster local interests. Each compact is an individual creation of the compact states and, as such, they are unlikely to feature uniform terms and are ill-suited to uniform principles of legal construction beyond those applied by the courts of the respective compact states. As Justice Frankfurter sagely put it in *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959):

> Since a Compact comes into being through an Act of Congress, its construction gives rise to a federal question. . . . But a federal question does not require a federal answer by way of a blanket, nationwide substantive doctrine where essentially local interests are at stake. . . . A Compact, is after all, a contract. Ordinarily, in the interpretation of a contract, the meaning parties attribute to the words governs the obligations assumed in the agreement. . . . [T]he language they employed in the Compact, not modified by Congress, should be limited to the legal significance that these States have placed upon such language, not to avoid the obligations they undertook, but to enforce the meaning of conventional language used in their law.

359 U.S. at 285 (Frankfurter, J., dissenting) (citations omitted).

Under this analysis, it is simply not material what construction the New York courts may put upon the Waterfront Commission Compact; what does matter are the rules of law employed by the courts of New Jersey and Delaware to interpret the Bay Authority Compact. And these, as we have shown, are entirely congruent: both Compact states have held that complementary and parallel expressions of policy, enacted by their respective legislatures, are applicable to the bi-state agency they have formed, with the consent of Congress. Their judgments in this regard need not be scrutinized or reviewed by this Court.

III. PETITIONER'S CLAIM THAT THE DECISION BELOW WILL LEAD TO "DISCORD" AMONG INTERSTATE AGENCIES IS ENTIRELY SPECULATIVE AND CONJECTURAL, AND DOES NOT PROVIDE SUFFICIENT BASIS FOR THIS COURT'S REVIEW

Petitioner insists that the decision of the New Jersey Supreme Court will, if unreviewed, "create enormous confusion and uncertainty as to which particular laws apply to interstate authorities," and lead to " 'discord and a destruction of the purposes for which . . . bi-state agencies are formed'." Pet. 22, 21, *quoting* Garabaldi, J., dissenting, at App. 20a. Nothing in the record at present even remotely supports this dire view, save for the solitary and subjective musings of the single dissenting Justice of the New Jersey Supreme Court. Thus, petitioner's grave warnings of the consequences of this decision reduce to a series of hypothetical and highly speculative scenarios, a "parade of horribles" of what *might* befall interstate agencies if they are subject to the doctrine of parallel legislation.

Such an ephemeral record does provide adequate basis for this Court's intervention. As this Court has noted, "[a] federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). The present Petition, at best, invites nothing more than "abstract" and "scholarly" speculation on the part of this Court.

Moreover, the claim that the DRBA's mission, as set forth in the Compact, will be eroded or compromised if it is required simply to recognize the right of its employees to negotiate collectively—the only concrete issue the Court has before it at present—is difficult to fathom. The Bay Authority is charged with the maintenance and operation of the Delaware River and Bay crossings between the

States of Delaware and New Jersey south of the boundary line between Delaware and Pennsylvania, and the development of any transportation or terminal facilities within that region. App. 56a, Article IV(a), (b). The parallel labor policies obtaining in the Compact states *prevent* labor disputes and unrest, by prohibiting employee strikes and channelling discourse into the cooperative arena of collective negotiations.[9] Far from sowing the seeds of "discord and . . . destruction," application of the parallel labor policies of Delaware and New Jersey to the DRBA can only aid in the regular and uninterrupted flow of traffic and commerce across the Delaware River and Bay.

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[9] Further, mirroring federal law, the labor policies of Delaware and New Jersey do not require the Bay Authority to accede to any of the proposals that may be advanced by the respondents in collective negotiations. Thus, petitioner's ability to "fix the terms and conditions of employment" remains, in the end, essentially undisturbed.

CONCLUSION

"[T]he delicacy of interstate relationships and the inherent limitations upon this Court's ability to deal with multifarious local problems have naturally led to exacting standards of judicial intervention" by this Court. *State ex rel Dyer v. Sims*, 341 U.S. 22, 27 (1951). This petition simply does not meet these exacting standards. It asks the Court to pass upon a question of compact interpretation that has been long settled by the relevant compact states in a consistent, considered manner; a doctrine that conforms fully to the terms of the Compact here at issue, does not contravene this Court's precedents, and does not materially conflict with any state or federal decisional law. For all these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS T. RUTHERFORD
General Counsel to the Grand Lodge of the Fraternal Order of Police
320 Gold Street S.W.
Suite 1000
Albuquerque, NM 87103
(505) 842-6700
Counsel for Amici Curiae, *Grand Lodge of the Fraternal Order of Police*

BRUCE E. ENDY *
CHARES T. JOYCE
SPEAR, WILDERMAN, BORISH, ENDY, SPEAR AND RUNCKEL, P.C.
230 South Broad Street
Suite 1400
Philadelphia, PA 19102
(215) 732-0101
Counsel for Amici Curiae, *Fraternal Order of Police, Penn-Jersey Lodge 30*

* Counsel of Record

APPENDIX

APPENDIX

APPENDIX

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CAMDEN COUNTY

Docket No. 7-7547-96
A. D. #———

FOP LODGE 30, *et al.*,
Plaintiffs,

vs.

DELAWARE RIVER PORT AUTHORITY,
Defendant.

TRANSCRIPT OF HEARING

Place: Camden County Superior Court
Hall of Justice
Camden, NJ 08103

Date: December 20, 1996

BEFORE:

HON. SAMUEL L. SUPNICK, J.S.C.

TRANSCRIPT ORDERED BY:

CHARLES T. JOYCE, ESQ. (Spear, Wilderman)

APPEARANCES:

BENJAMIN EISNER, ESQ. (Spear, Wilderman)
CHARLES T. JOYCE, ESQ.
Attorneys for Plaintiffs

SCOTT F. COOPER, ESQ. (Blank, Rome, Comisky & McCauley)
SAMUEL M. FIRST, ESQ.
Attorneys for Defendant

[2] THE COURT: Number 44, FOP Penn Jersey Lodge 30 v. Delaware River.

MR. EISNER: Here for the plaintiff, Your Honor.

MR. FIRST: For the defendants.

THE COURT: Come forward. Enter your appearances please.

MR. COOPER: Good morning, Scott Cooper with Blank, Rome, Comisky & McCauley and Sam First.

THE COURT: I'm sorry. Scott what?

MR. COOPER: Cooper, C-O-O-P-E-R. We're the defendant and the moving party.

THE COURT: Okay.

MR. EISNER: Your Honor, Benjamin Eisner, for the plaintiffs, of Spear, Wilderman, and I have with me today to introduce to the Court Charles Joyce of my firm, a member of the Bar of the Commonwealth of Pennsylvania who has been admitted pro hac for the purposes of this matter.

MR. JOYCE: Good morning, Your Honor.

MR. COOPER: If we may, Your Honor—

THE COURT: Did you enter your appearance?

MR. FIRST: Sam First, Blank, Rome, Comisky & McCauley for the defendant FOP Lodge—I'm sorry—for the defendant DRPA.

THE COURT: Okay.

MR. COOPER: As Your Honor has—

[3] THE COURT: It's DRPA's motion.

MR. COOPER: That's correct, and it is a motion for summary judgment, but it's in effect a motion to dismiss the underlying complaint and to ask that you deny the request for equitable relief that's before the Court. This case presents a similar issue to when we were before Your Honor back in April in which a theory of liability is being asserted against the Port Authority and we have—

THE COURT: May I just ask a question before you —this was before Judge Davis?

MR. COOPER: Judge Fluharty originally.

THE COURT: It was what?

MR. COOPER: Before Judge Fluharty originally.

THE COURT: Where did I see that this was before Judge Davis before and he transferred it to the Law Division?

MR. JOYCE: That's correct.

MR. COOPER: That is correct.

MR. JOYCE: Your Honor, if I may, that's correct. He transferred it to the Law Division sua sponte.

THE COURT: Why did he do that?

MR. JOYCE: The Court did it on its own, Your Honor. We don't know why the Court did it.

THE COURT: All right. Go ahead.

MR. COOPER: We wondered the same thing, especially in view of what they're asking for.

[4] THE COURT: I mean in view of the relief, that's why I say that. I don't understand it.

MR. COOPER: The quick—I think both sides have the same question.

MR. JOYCE: That's correct, Your Honor, but both sides also I think are in agreement that—

THE COURT: Maybe you gave him big briefs and he didn't want to read them.

MR. JOYCE: We apologize, Your Honor. It's an important case.

THE COURT: I know. You were before me before with regard to—

MR. COOPER: With another one of these—

THE COURT: It was a different matter, yes.

MR. COOPER: Different matter, but basically, we begin in the same point which is a question of whether what would undoubtedly be a very valid legal theory in any other arena except that the defendant is a bistate instrumentality. The question is where are we going? I just want to note for the record up front we are not counsel involved in the underlying labor negotiations. So what we know of what happens there or don't happen, the facts will be somewhat shorter, but I think it ultimately won't make a difference based on the legal theory here. There's no dispute that the FOP has been the bargaining representative for the police going back into

[5] the mid-1970's and that the FOP and the DRPA currently do not have a present labor contract of any kind. It expired in August of I believe 1995—of this year after a mutual extension. And the question before the Court right now is whether the plaintiff's request to do things, number one, make a finding that our client has violated either the New Jersey Constitution or some parallel set of laws in Pennsylvania—

THE COURT: Your contention is that there is no complementary law or parallel legislation that exists between the two states.

MR. COOPER: That is correct. That is the—

THE COURT: Inasmuch as you're a bistate agency, set up through the authority of a special act of Congress.

MR. COOPER: That is correct.

THE COURT: And which you're a separate agency, right?

MR. COOPER: That would be the—

THE COURT: Your adversary contends that there is parallel—

MR. COOPER: That is correct.

THE COURT: —legislation.

MR. COOPER: That's correct, and I think for the record, it's important to note that because this is such a complicated issue, the cases continue to evolve in terms of the legal theory. I think when it first started, it was a claim [6] that we had directly violated the New Jersey Constitution. As we filed our first set of papers and point out you can't bring such a claim, I think the plaintiffs have properly advanced the theory to say, no, you've got to look at the policy of the two states and see if we can create some kind of a remedy here in the Law Division. And that is why in our reply brief, we have pointed out to the Court just how unworkable that would be and more importantly that Pennsylvania and New Jersey have never consented to such a concept. Public sector labor rights exist as we've pointed out in a very intricate working with executive agencies ranging from executive directors to labor boards to determining what rights have been

violated in the process of collective negotiations. None of that can exist if the remedy the plaintiffs are looking for is allowed to go forward, and that's why we've asked that the case be dismissad right now.

THE COURT: What would you say the status is at this time?

MR. COOPER: The status as I understand it—

THE COURT: Is there any representation that exists at the present time?

MR. COOPER: Yes, I mean there—

THE COURT: Representation in what regard?

MR. COOPER: In the regard—

THE COURT: Do you recognize any representation?

MR. COOPER: Yes, of course we do. We're dealing [7] only with—

THE COURT: All right. Now, what is the status or the condition of the situation now?

MR. COOPER: As I—

THE COURT: I know you contend that there is no contract. Now, their argument is that unilaterally, the commissioners enacted certain work—I don't know what they were that were enacted. I don't think they were set forth, but that's unimportant, and there's been unilateral action.

MR. COOPER: That's correct.

THE COURT: All right.

MR. COOPER: Our position is is that absent a contract, that's exactly right.

THE COURT: Now, you say that they have to live by the unilateral action?

MR. COOPER: Until such time as the parties get back to the table, that's correct.

THE COURT: So that you can modify the agreement in any respect that you see fit by merely terminating it.

MR. COOPER: Actually, it's just to the contrary. As long as there's a contract in place, we're powerless to do anything except live by the agreement—

THE COURT: I say but it—

MR. COOPER: —which is why it's so important, and I think both sides knew it was so important.

[8] THE COURT: But the contract had a provision in it that permitted termination at the end of its term, didn't it?

MR. COOPER: And in fact, that's a critical point in this case, that this contract unlike previous contracts did not say that there would be, as is often the case in traditional labor cases, a right of successorship or an automatic right of renewal at the end, and I think—

THE COURT: That was left out sometime—

MR. COOPER: Sometime in—

THE COURT: —after 1990 I think was indicated.

MR. COOPER: That's correct, and again—

THE COURT: Was that deliberately left out or was it by accident or does anybody know?

MR. JOYCE: May I respond to that, Your Honor?

THE COURT: Yes.

MR. JOYCE: It's unclear from the record why that was left out, and I would hold that the termination of a renewal clause is ambiguous at this point because although it doesn't have the standard language that says the contract will continue in force and effect from year to year, it says the only way the contract is terminated is if either party gives notice to terminate the contract. So it's somewhat unclear, and also, it's undisputed that both patries in the fall of 1995 agreed to renegotiate a new contract. So there was an agreement going forward to renegotiate a new contract. They have admitted that [9] in response to our material statement of fact number 19. So I think —we think it's immaterial whether or not the contract terminated by its terms on December 10th, 1995 or not. The parties had an agreement to go forward and negotiate a new agreement. They in our view breached that agreement, breached that promise to renegotiate the contract, and that's why we're here.

MR. COOPER: Your Honor, our position is obviously that an offer to sit down and continue negotiation

for something that will happen when you do not have a legal obligation to make another contract at the end of this one is the same as when any other two parties know that a contract's about to expire.

THE COURT: Tell me, let me ask you this. Suppose you sat down and you attempted to negotiate and you couldn't agree. What then?

MR. COOPER: Then the parties are free to go their own way unfortunately.

THE COURT: But what would that have to do with the initial recognition that you gave, the fact that you voluntarily on a mutual basis recognized the union when they offered—when they submitted a basis for recognition? You conducted or allowed to be conducted through the three A's an election in order to determine who the appropriate bargaining agent for the employees would be, and they were appropriately [10] designated. I know that there is no law—I don't think there's any law that exists other than as I recall except under the NLRB insofar as recognition is concerned. I don't think the State has any such—what is it, three years under NLRB or five years? Three years?

MR. COOPER: It's usually a three-year contract.

THE COURT: But NLRB doesn't apply here I know.

MR. COOPER: It does not apply here.

THE COURT: But you have the recognition. You've had a practice of contracts over the years. You've negotiated the contract with this group right along, and you contend that you're in a position and that there's no complimentary law. There's not a law that exists between the two states that entitles them to—

MR. COOPER: I think that against the background of the sovereign immunity that we have raised here, that until the legislatures get around quite candidly to passing the laws that they have in New Jersey and in Pennsylvania created—

THE COURT: Well, your adversary argues that there are parallel or complimentary laws, and they also set

forth the provisions both in the Pennsylvania law that was set up in connection with governmental employees that requires negotiations in good faith as well as the fact that the New Jersey—

MR. COOPER: Correct.

[11] THE COURT: —Constitution which permits—recognizes the right of government employees to organize also recognizes that obligation of good faith. You mean to say—did I understand your argument that unless they have a constitutional provision, that since we have a constitutional provision here, that there are no parallel or complimentary law?

MR. COOPER: No, Your Honor. In fact, that's the way the case started, but I think where we are now is and the one part that's missing I think in the analysis here—you're absolutely right. New Jersey has a set of laws that nobody can debate, and you have certain rights as a public sector employee, and 95 percent of those are the same in Pennsylvania. The crucial difference is those rights don't exist in a vacuum. They exist to the extent that a government agency, whether it's the Pennsylavnia Labor Relations Board or our PERC, has oversight jurisdiction not only to suggest that those rights exist but to interpret them and to enforce them when the parties break down. The thing that is missing in this case is any government agency that would have oversight authority to monitor what I would call the traditional labor concepts, that New Jersey and Pennsylvania clearly recognize for their own domestic employees. That's the critical piece that's missing. New Jersey can pass all the laws it wants subject to PERC regulation for our employees, no dispute. Pennsylvania can do [12] the same thing. Why? Because there's a Pennsylvania Labor Relations Board that says, this is what it means when you bargain in bad faith; if you don't like it; you go to the commissioner; he'll issue a complaint; you have a mini-trial; you can appeal it and you do all those things. What the plaintiffs cannot point to in this case is any such government agency, whether it's the NLRB or PERC or the PLRB. Indeed they

concede none of these agencies affect it, and that's the critical difference. The concepts—

THE COURT: You don't think—

MR. COOPER: The concepts, if I may, that we're throwing around in Court, they're terms of art. The terms of art don't exist unless you got an administrative structure to enforce them and to create them. There is no such thing, and that's not a problem. It's just a separation of powers issue.

THE COURT: I don't know—I don't know if that question has ever come up in connection with any of the other governmental employee contracts, that situation has ever arisen, but I would like to ask this question. Wouldn't you think that the Courts could step in to fill a vacuum?

MR. COOPER: Well, obviously, I mean that is the million-dollar question in this case, and the plaintiffs say yes and we obviously say no for the reasons I think we set forth substantially in our reply brief. It's not just a question of stepping in and creating some kind of an equitable [13] remedy. The question is have the legislatures decided to give the executive branch or some entity the authority to create the scheme that exists in New Jersey and exists in Pennsylvania and obviously exists at the federal level at the NLRB? Yes, the Court could in some manner make it up as we go along, and I know that this is, as I said in our brief, the uncomfortable position they want us to be in to suggest this Court can't do it. Obviously, you can come up with a remedy. The question isn't whether you can. The question is whether you should.

THE COURT: The area or the extent to which a Court could go—I mean I'm not—

MR. COOPER: Yes.

THE COURT: I can appreciate the fact that there could be an area that the Court would certainly—

MR. COOPER: Correct.

THE COURT: —be exceeding its authority, or at least it would be overreaching.

MR. COOPER: And, Judge, we contend obviously that in an area such as this where the backdrop in the defense really is a form of sovereign immunity, that to the extent you can't find the consent of the two states to do what they are asking, this is an extraordinary remedy because as you pointed out, we will be making this up as we go along. I mean when you appoint mediators, will your law clerk be a fact-finder, is somebody from this Court going to sit at the table? All the things that [14] would be so garden variety if we were before PERC, because they've got the agency, they've got the funding, they have the expertise in the field. I mean I suppose the Superior Court could make this up, but the whole point of this is that Pennsylvania and New Jersey have never ever envisioned that the trial Court of either state would in the first instance be the party to do what routinely happens at PERC and at the PLRB, and as I say, it's an extraordinary leap to give them what I know we all want which is some sense of fairness here. When New Jersey and Pennsylvania get around to creating the kind of agency structure as they've done with the commission board and as exists at PERC or the PLRB, yeah, they would have a claim, and we would have to go through all the other things you have to do. But until that day comes, I respectfully submit that it is wrong to ask the Court to create this as we go along because that's what this will be.

THE COURT: Yes, but you're moving—at this point, you're moving for a summary judgment.

MR. COOPER: That is because, Your Honor, there is nothing left to do in this case. If you allow either the injunctive relief that they're asking for—and I'm not sure how this would happen. We would be forced back to the table I guess under the supervision of the Court. But if the complaint can go forward, that we have bargained in bad faith as I believe is what Count 2 has presently pled, again that is a [15] term that doesn't mean anything in the public sector outside of the administrative agency. As I said, in Pennsylvania or New Jersey, you can't walk forward and argue you're bargaining in bad faith under

the statute. You've got to convince the commissioner that you have violated the act, and the commission becomes the advocate after issuing the complaint, all the things that exist in New Jersey as well as at the NLRB. Now, a point here is I just don't see how the Court fits into that mix. I mean would Your Honor then be the prosecutor if we have been found to violate in bad faith? And then who do we try our case to? All of that—and I don't even want to get into all the detail.

THE COURT: I don't know. The Court might have to conduct a full hearing in connection with that. As I say, you have now a motion to dismiss the action in its entirety—

MR. COOPER: That's correct.

THE COURT: —on the basis of the fact that you say none of these things could possibly occur.

MR. COOPER: I'm not saying it couldn't occur. That's what I'm most afraid of. I actually think the Court probably could fashion a remedy, but the point is your remedy wont's look anything like the administrative scheme that the states have debated up in Trenton or in Harrisburg or even in Wasington, DC. It won't look anything like that.

THE COURT: Yes. Well, I can't jump to that [16] conclusion because I really—

MR. COOPER: But unfortunately, Judge, what I'm suggesting is you'll have to because if this complaint goes forward, there's really no discovery to be had here. The only question is can the Court get involved to implement the kind of procedures that would exist if we were a purely domestic employer here in New Jersey in the public sector. And from day one, that will implicate the Court directly, whether it's sitting down and sending a mediator, whether it is conducting findings of fact. This isn't one of those lawsuits where we get by the motion to dismiss and the parties go away and deal with discovery and we come back to the Court in six or seven months. The Court will be immediately brought into this, and as I say—and I keep repeating—you'll be making this up

as we go along. That is not what any legislature has ever intended to have happen in this area. Parties are supposed to know the procedural rights going in. We'll be making this up as we go along. It's not what Trenton's envisioned. It's not what Harrisburg ever envisioned, and until they sit down and give us some more guidance, there isn't a legal theory that can go forward here without the remedy being worse than the underlying problem.

THE COURT: In what respect are you looking for them to give you some kind of guidance? Would that be by enacting legislation that would be on a complimentary or a mutual basis?

[17] MR. COOPER: I think in all candor, we're beyond complimentary legislation.

THE COURT: Yes, I think so.

MR. COOPER: What I'm looking for is an agency that would have the power and the resources to do what would happen if we were a purely domestic public employer in New Jersey or in Pennsylvania. I mean there's no dispute. If you're in New Jersey, you go to PERC. Everybody knows what your guidelines are. There's an extensive administrative code on this point. There are statutes that tell you what there are. There is judicial case law that talks about how to interpret the Public Employer/Employee Relations Act. That's the kind of thing we're looking for. That's what's missing in this case. It's not a complimentary legislation. There's no executive agency.

THE COURT: You don't necessarily say that the Court couldn't provide that, but you're questioning whether it could provide it—

MR. COOPER: Whether you should.

THE COURT: —in an effective manner in its entirety.

MR. COOPER: I'm raising two points; number one, whether you should and, number two, whether New Jersey and Pennsylvania have ever consented to allowing a trial Court to do what you would in effect have to be doing going forward from this day.

[18] THE COURT: Let me hear from your adversary.

MR. JOYCE: Thank you, Your Honor. Your Honor, first of all, it seems to me that DRPA's argument at this stage in the proceedings boils down to the proposition that because these rights that we are alleging we have may be somewhat difficult to effectuate and enforce, these rights don't exist. Well, that argument ignores the long history of New Jersey Courts stepping in, enforcing and protecting both private sector and public sector labor rights precisely because there was no administrative agency that was either able or willing to enforce those rights. Remember, Your Honor, that between 1947 when the New Jersey Constitution was enacted giving the public sector labor protections and 1968 when the administrative agency was developed, the Courts determined what the rights were of public employees.

THE COURT: Even before the NLRB.

MR. JOYCE: No; before the New Jersey Public Employer/Employee Relations Act.

THE COURT: PERC, okay, sure.

MR. JOYCE: Exactly, Your Honor.

THE COURT: Okay.

MR. JOYCE: In 1964, the New Jersey Turnpike Authority case, the Court ruled that public employees don't have the right to strike.

THE COURT: What happened in Pennsylvania?

[19] MR. JOYCE: Excuse me?

THE COURT: What happened in Pennsylvania?

MR. JOYCE: Well, in Pennsylvania, Your Honor, there was a legislative scheme. So Courts did not have to get involved, but New Jersey Courts have historically gotten involved. And it had no hesitancy in getting involved where there's no administrative agency. And, Your Honor, to this very day, the Courts get involved where there's no administrative agency in protecting labor rights. Just last May in a case that Mr. Eisner actually argued and won in the Appellate Division which we didn't cite in our brief—but it's *South Jersey Catholic*

Teachers Association v. The Lay Diocese of Camden, 290 New Jersey Super 359. The Appellate Division ordered the Chancery Court to order and oversee a union representation election among lay Catholic teachers precisely because no administrative agency either could or would assert jurisdiction over those workers. So this is not a novel proposition of law we're advancing here. This is entirely within the competence of this Court, and it's what Courts have historically done where there is no administrative agency to step in and effectuate the rights.

As a matter of fact, in one of the cases that the defendant cites in their brief, in one of the PERC decisions, the DRPA/PERC decision, PERC says in cases such as this where there's complimentary legislation, we can't, PERC can't assert [20] jurisdiction; rather State Courts must decide these disputes. So there's precedent for this, Your Honor, and the argument also—their argument also overlooks the fact that this is a Court that can exercise equity powers. You have enormous flexibility, enormous creativity to craft a remedy here. You can, as New Jersey Courts have done in the past, look to federal law to determine what the rights and remedies are. Under the *Molanany* (phonetic) case in the New Jersey Supreme Court, that's what they did. You can appoint a special master to oversee negotiations. You can ask the triple A to appoint an arbitrator if the parties cannot reach an agreement after good-faith negotiations, trying to reach an agreement over the terms and conditions of employment. The Court's authority here is limited only by its imagination, and there are enormous sources of law and sources of authority that you can dwell upon. It is no answer to say because it may be difficult to do, that these law officers who enforce the laws of the New Jersey and Pennsylvania have no rights. It's just no answer to say that.

And if I might, Your Honor, briefly talk about—it's clear to me that you've read our papers very carefully, and I appreciate that. But if I might briefly talk about the whole issue of complimentary regulation and this

Court's ruling in the *Ruggiero* case. I think that the *Ruggiero* case is different from this case. In the *Ruggiero* case, as Your Honor [21] will recall, you found clear differences between the New Jersey Whistle-Blower Act and the Pennsylvania Whistile-Blower Act—

THE COURT: I think there were differences, yes.

MR. JOYCE: Yes. Most similarly, Your Honor, there were two different statutes of limitations. If Mr. Ruggiero would have brought this action in Pennsylvania, he would have been time barred, but in New Jersey, he wouldn't have been time barred. So you couldn't apply that law to the bistate agency. That clearly would have been improper. Also, Your Honor, your decision in *Ruggiero* came down one month before the New Jersey Supreme Court came down with its decision in *Bunk v. Port Authority*, a decision that the defendants don't even address in either their original brief or their reply brief. The *Bunk* case is at once the most expansive and the most recent application of the principle of parallelism—

THE COURT: Which case?

MR. JOYCE: *Bunk v. Port of New York and New Jersey*, Your Honor. It was cited—

THE COURT: Yes, I have it.

MR. JOYCE: —in our brief. The *Bunk* case is extremely important, Your Honor, and I think it's a precursor of what is to come, the *Local 68* case, which we rely on heavily in our brief and as I understand defendant says we can't cite because it hasn't been approved for publication by the Appellate Division, is currently on appeal in the New Jersey [22] Supreme Court, and a decision is imminent in that case. Oral argument was held three months ago, and I've spoken to the attorney that is arguing that case, and he believes a decision is coming out any day. If the Court—if the New Jersey Supreme Court follows what they did in *Bunk*, they will affirm the *Local 68* case, and the *Local 68* case is on all fours with this case. In that case, the Appellate Division ruled that the employees of the Delaware River and Bay Authority had the right to organize into unions on the basis of the

New Jersey Constitution and the complimentary Delaware Right-to-Organize Statute. It was immaterial to the Court whether or not the laws were identical. They don't have to be identical. They just have to be somewhat similar. It was immaterial to the Court that there was no administrative agency to effectuate these rights. Rather, it was the job of the Court to effectuate those rights, and that's all we're asking you to do, Your Honor. The defendant has raised a parade-of-horribles argument as to what ills will befall them and what problems will ensnare this Court. But all we're asking, Your Honor, is very little. All we're asking is to be treated like every other police officer in New Jersey and Pennsylvania. These officers—and many of them are in this courtroom today, Your Honor—suffer the same frustrations—

THE COURT: Is that why I had a crowded courtroom? I thought I had a few cases today.

[23] MR. JOYCE: They're not wearing their uniforms, Your Honor, but they're here.

THE COURT: I want to tell you you frightened the devil out of me before I got on the bench.

MR. JOYCE: Your Honor, these—

THE COURT: My law clerk came back and said, there are a lot of people out there. I knew there shouldn't be.

MR. JOYCE: It's an important case for them, Your Honor. These officers suffer the same frustrations as their brethren. They have the same dangers, the same work pressures. They enforce all the laws of New Jersey and Pennsylvania, and if Your Honor dismisses this case, it means that they have no laws to protect them in their employment.

THE COURT: Gentlemen, the Court recognizes the problem, and the basic argument of course in connection with the fact that there is no parallel or complimentary law as it exists between the two states, that this Delaware River Port Authority—it can be applied to the Delaware River Port Authority, a bistate agency. In the Court's opinion, that is not so. I think that Pennsylavnia law

and New Jersey law, even though New Jersey makes reference to the right of governmental employees of course to organize and so forth as set forth in the Constitution —I do think that Pennsylvania has set forth parallel or complimentary legislation of a different nature but which is nevertheless—which nevertheless recognizes those [24] same rights and clearly gives public employees a right to freely organize and designate representatives and also to negotiate in good faith. And the fact that there might be some problem which might exist as has been argued by Delaware River Port Authority in connection with no agencies existing whereby—of a nature that would be able to deal with the problems that might be ultimately encountered and resolve them, I think that the Court has the power, the inherent power, to deal with matters of that nature.

The Court's of the opinion that the motion should be denied for the reasons that I have stated. I find that there is a basis for this cause of action proceeding, and I do not find that there is a lack of mutual law that exists between the two states to permit it to proceed. I'm going to deny the motion.

MR. JOYCE: Thank you very much, Your Honor.

MR. COOPER: Your Honor, before we leave, may we ask some—as I prefaced we would, we already are going to need some direction from the Court then. As I say, I'm not counsel for the Authority in negotiations, but I'm not sure whether they're even talking. Where do we now go from here? Is the Court going to appoint some—

THE COURT: I do not—I intend to call a meeting of all counsel immediately after we return the beginning of the year and see if something cannot be set up on a mutual basis as [25] to avoid any further court action and possibly to expedite this matter. Of course, at this point—

MR. JOYCE: That will be fine, Your Honor.

THE COURT: —I'm doing that because I think—and I recognize the importance of proceeding and not waiting for other applications to be made. So immediately

after the first of the year, we will call counsel. I assume you wanted me to call counsel that is—not you.

MR. COOPER: Here in this proceeding and to the extent we need to bring other counsel who may not be admitted to this Bar, we will.

THE COURT: Well, we'll notify you.

MR. COOPER: Please do.

THE COURT: And you can bring in whatever counsel is necessary, and we'll schedule meetings accordingly. I don't have anything scheduled as I know of yet after the first of—do I? I think my calendar's pretty much cleared up.

MR. JOYCE: Your Honor, you set the meeting. We'll be there.

MR. COOPER: Yes, we'll be there.

THE COURT: And we'll call you and set it up on a mutual basis, all right?

MR. JOYCE: Thank you very much, Your Honor.

MR. COOPER: Thank you, Your Honor.

THE COURT: You're welcome.